82-578

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

No._____

OBERT E. BRADY,	)
	)
Petitioner,	)
	)
v.	)
	)
ALLSTATE INSURANCE COMPANY,	)
	)
Respondent.	)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the court below erroneously reversed the jury's verdict on the ground that the evidence of defendant's intent to discriminate was insufficient, when there was in fact evidence from which a jury could reasonably infer an intent to discriminate, thereby infringing petitioner's Seventh Amendment right to jury trial and creating a conflict with this Court's decision in Pullman-Standard v. Swint.

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OPINION BELOW

The opinion of the Court of Appeals is reported at 683 F.2d 80 (4th Cir. 1982) and appears in the Appendix hereto. No opinion was rendered by the District Court for the Middle District of North Carolina.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 6, 1982. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under §1254(1) of Title 28, United State Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment 7:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. §1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Plaintiff Obert Eugene Brady brought this action in the U.S. District Court for the Middle District of North Carolina, charging that his termination by defendant Allstate Insurance Company ("Allstate") was based on his race and therefore violated the Civil Rights Act of 1866, 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq.

The case proceeded to trial on August 3, 1981 before Judge Eugene Gordon and a jury on the § 1981 claim alone. Motions by the defendant for directed verdict at the close of plaintiff's case and at the conclusion of all the evidence were denied. The jury returned a verdict finding that Allstate had discriminated against plaintiff by discharging him because of his race, and awarded him damages in the amount of $33,431.00. Defendant subsequently moved

for judgment notwithstanding the verdict and in the alternative for a new trial. That motion was denied by Order of the court dated September 25, 1981, and defendant filed timely appeal to the United States Court of Appeals for the Fourth Circuit. A panel of that court on July 6, 1982 reversed the judgment of the district court and ordered that judgment notwithstanding the verdict be entered for defendant.

Mr. Brady, the plaintiff, is white. His former fellow employee, Joe Williamson, is black. Both Mr. Brady and Mr. Williamson were employed as property claims adjusters by defendant at its Greensboro office. Plaintiff had good evaluations from his superiors and received various awards and letters of commendation throughout the time that he was an employee of defendant.

For many years Allstate has had formal conflict of interest rules, which on their

face prohibit adjusters from engaging in garage or body shop work. Since prior to plaintiff's employment with Allstate in 1966, these rules had been suspended at least in the Charlotte, North Carolina region. According to the written statement of Charles B. Flynn, defendant's claims security analyst, entered into evidence at trial:

> It was generally known throughout the office that Gene [the plaintiff] was engaged in the repairing of cars. I discussed the situation with Wink Hackney and Dave Warstler due to a possible conflict with company policy. In the presence of Wink Hackney who was the PUM at that time, we had a conference with Gene. I cannot recall the exact date, but it was prior to June, 1974. At that time I told Gene that it was permissible for him to repair cars in his garage as long as the cars he repaired did not involve Allstate claims and as long as it did not interfere with his getting his job done at Allstate.

Mr. Brady owned a shop and tools located in a building adjoining his house. At

this location he and Joe Williamson carried on an automobile repair business. While the business was named "Brady's Body Shop", Mr. Williamson had a key to the place and worked there regularly, sometimes with plaintiff and sometimes in plaintiff's absence. Plaintiff and Mr. Williamson split the profit equally on the jobs they did together. Some of the work was brought into the shop by plaintiff, and some was brought in by Mr. Williamson. A large part of the work consisted of buying wrecked vehicles ("salvage work"), rebuilding them, and selling them for profit. The remainder of the work was repair work done at the order of customers ("custom work").

In the early fall of 1976, David Coble, a neighbor of plaintiff's, asked plaintiff to repaint his wife's automobile and do some repair work on it. Before plaintiff had an opportunity to do the work, the vehicle was

involved in a wreck. Plaintiff and Mr. Williamson by chance were present at defendant's drive-in office on a day in September, 1976, when Mr. Coble was there with the damaged vehicle to present his claim against an Allstate insured. At a later time Mr. Coble asked plaintiff if he would do the repair work on the vehicle, including the work he had previously agreed to do. After being advised that the claim had been paid by Coble's wife's insurance carrier, and not by Allstate, Mr. Brady agreed to make the repairs. Mr. Williamson was present when Brady agreed to repair the vehicle; both men worked on the job, and they split the profit equally, as was their custom.

As a result of the work on the Coble vehicle, defendant undertook an investigation of plaintiff. In February, 1977, plaintiff was suspended from his job with-

out pay. Mr. Williamson was never suspended, although Allstate was aware of Williamson's involvement in the repair at the time plaintiff was suspended.[1]

On March 28, 1977, plaintiff was called to defendant's offices in Charlotte. He was presented with a statement, which he was asked to sign, that read:

> Your involvement in the repair of Mr. David Coble's automobile was a violation of Allstate's employe [sic] outside business interests policy. No matter what your prior understanding with regard to permission to repair automobiles on a part-time basis, you are advised to cease and desist from engaging in any business activity involving the repair, rebuilding or towing of automobiles within two weeks from this date.

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1 The Court of Appeals opinion mistakenly states that defendant was not aware of Williamson's involvement at this time. In fact, documents provided in response to plaintiff's first set of interrogatories, contained in the record, include written statements from Williamson dated 2-4-77 and 2-9-77, describing his involvement.

> Your job is in jeopardy and your termination will be recommended if you are found not to be in compliance with the above stated policy within two weeks from this date or, if you are found to be in violation of the attached statement of company policy at any time in the future.

Attached to the memorandum was a document entitled "Claim Department Employees and Company Policy," which contained the following paragraph:

> No claim employe may be employed, full or part-time, who owns or maintains a business interest in any Garage, Auto Glass Shop, supplier of materials commonly used in the repair of automobiles, building supply, building contractors, home or home furnishing repair or replacement business, or in any business performing services commonly used in the adjustment of claims.

Plaintiff testified that he asked defendant's representatives who presented him with the statement for permission to alter it, so that he would be allowed to do "salvage work", although he would be giving up "custom work". Mr. Brady testi-

fied that he would have signed the statement in this amended form. Plaintiff was told that no changes could be made in the form. When plaintiff refused to sign the form without the requested change, he was fired. The claimed reason for his discharge was that he refused to comply with the company's conflict of interest policy, with which management intended thenceforth to require strict adherence.

Mr. Williamson was not interviewed concerning the repair business and company policy until April 17, 1977, three weeks after plaintiff was fired. On that date Mr. Williamson was asked to sign a statement as follows:

> The purpose of this corrective interview is to review with Joe Williamson Allstate's code of conduct for Claim Personnel.
>
> It is necessary that at all times the integrity of Allstate claim employees and that of the company be unchallenged from any source.

> The attached Conflict of Interest Form outlines company policy of practices which might be misinterpreted, criticized, or challenged.
>
> Joe has in the past engaged in work in some aspects of auto repair/painting business.
>
> In one instance this involved doing work on an Allstate customer's auto.
>
> In order to avoid a future conflict of interest Joe should cease from engaging in any aspect of the automobile repair/painting business.
>
> _____
>
> I have read and understand the above statement and the attached Conflict of Interest Form.

Mr. Williamson refused to sign the form in the way it was written. He added the following at the bottom of the form:

> I agree with the above agreement but request that I be able to continue to purchase and build salvage on a personal basis, this would involve no customer work or competition among the body repair industry.

Mr. Williamson testified he did not think he would have been willing to sign the statement that was presented to plaintiff

without including the addendum that he put on his own form. Mr. Williamson was allowed to sign the statement, as amended. Both Mr. Williamson and defendant's management employees understood that he would have the right to rebuild wrecked cars and sell them later, even though that would technically violate the company conflict of interest policy. Mr. Williamson was allowed to maintain his position as a claims adjuster for Allstate, and at the time of trial he was a Senior Claims Representative. He never heard anything further about the conflict of interest policy or whether his amendment had been accepted.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW REPRESENTS AN EROSION OF THE SEVENTH AMENDMENT RIGHT TO A JURY TRIAL AND CONFLICTS WITH THIS COURT'S RULING IN PULLMAN STANDARD v. SWINT THAT INTENT TO DISCRIMINATE IS PURELY AN ISSUE OF FACT.

The decision by the Court of Appeals for the Fourth Circuit, reversing the trial court's denial of defendant's motion for judgment notwithstanding the verdict, exemplifies a disturbing trend among lower appellate and trial courts toward arrogating greater decision-making power to the judiciary at the expense of the jury, by invading the jury's constitutional role as finder of fact. This trend is particularly noticeable in recent decisions

in the area of employment discrimination.[2]

Of course, Rule 50 as properly applied, to take from the jury decisions which do not involve a question of fact on the evidence presented, has been upheld by this Court in its sanctioning of both directed verdict and j.n.o.v. Galloway v. United States, 319 U.S. 372 (1943); Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967). But the Court has also cautioned the judiciary to

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2 In addition to the instant case, petitioner offers as examples the following recent decisions under the Age Discrimination in Employment Act, under which litigants are entitled to jury trial and must prove that age was a factor in the contested employment decision: Lovelace v. Sherwin-Williams Co., 29 F.E.P. Cases 172, (4th Cir. 1981) (j.n.o.v. by trial court affirmed); Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981) (denial of j.n.o.v. reversed); Ford v. General Motors Corp. 656 F.2d 117 (5th Cir. 1981) (directed verdict against plaintiff affirmed); Houser v. Sears Roebuck & Co. 627 F.2d 756 (5th Cir. 1980) (j.n.o.v. affirmed); Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980) (j.n.o.v. affirmed).

police itself and to maintain careful limits on the use of Rule 50, preserving the Seventh Amendment guarantee that "the jury be allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them." Galloway v. United States, 319 U.S. at 396. See also Justice Black's dissent in Galloway, pp. 396-407. The distinction between permissible and impermissible use of the jury-controlling device has been succinctly put by Judge Haynsworth:

> [N]o constitutional question arises when the court withdraws from the jury a case in which there is no issue of fact requiring the jury's determination....Were a court indifferent to the established basis upon which powers have been allocated between the court and jury or beguiled into rejection of every view which seemed to it less reasonable than its own, a violation of constitutional right might well be said to have occurred.

Manaia v. Potomac Elec. Power Co., 268 F.2d 793, 799 (4th Cir. 1959).

Though there have been a number of different formulations of the "test" for sufficiency of evidence to go to the jury, the basic question is whether there is evidence upon which the jury could properly find a verdict for the non-moving party. In considering this question,

> ...the court is not free to weigh the evidence or to pass on the credibility of witnesses or to substitute its judgment of the facts for that of the jury. Instead it must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence....The fundamental principle is that there must be a minimum of interference with the jury.

9 Wright & Miller, Federal Practice and Procedure, 543-45 (citations omitted).

The difficulty in evaluating the evidence in employment discrimination cases seems to arise often when the court reaches the crucial issue of whether a plaintiff has proved an intent to discriminate,

purposeful discrimination, or that an impermissible factor was the primary motive in an employment decision. In these times, unlike the early days of Title VII, there will rarely be direct evidence of purposeful discrimination available to a plaintiff required to prove intentional discrimination or to overcome a defendant's rebuttal evidence with a showing that a proffered legitimate reason for an employment decision is actually pretextual. Most often indirect or circumstantial evidence will be offered, from which the jury may or may not draw the inference of intentional discrimination. In this case, similarly to other recent cases in the employment discrimination area,[3] the court concluded that "there simply was not substantial evidence adduced at trial to support a finding that discrimination was a motive for [plaintiff's]

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3 See cases cited note 2 supra.

dismissal." But what the court has actually decided, as will be more fully developed below, is that the inference which the jury drew from the evidence was incorrect, and the contrary inference should have been drawn. Thus, in the guise of allowing only "legitimate" inferences to be drawn, and preventing speculation and conjecture from entering too far into the equation, courts are actually weighing conflicting evidence and choosing that view of the evidence that appears most reasonable to the court. This, of course, far oversteps the bounds of permissible jury-control devices. See 9 Wright & Miller; supra, at 563-66, and cases cited therein.

Naturally a verdict having no substantial evidence to support it, and thus based entirely on speculation and conjecture, cannot stand. But, as this Court pointed out in Lavender v. Kurn, 327 U.S. 645, 655

(1946): "Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference." It is in the nature of the evidence in cases such as this one, that some measure of speculation will be involved when the jury reaches a finding of intentional discrimination on the basis of indirect evidence. But this is precisely the jury's function -- to judge the credibility of witnesses, weigh conflicting inferences, and choose the one it finds most logically derives from the testimony and the evidence to draw the ultimate conclusion as to the facts.[4]

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4 Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1964).

Petitioner submits that trial and appellate courts are too frequently substituting their own judgment of what is reasonable for that of the jury, such that the constitutional right to jury trial is being eroded, and the exercise of this Court's supervisory power is warranted to reassert the proper standard for submission of the issue of intentional discrimination to the jury when the plaintiff's case is based on indirect evidence.

This Court recently clarified the standard for review of a trial court's findings on the issue of purposeful discrimination, in Pullman-Standard v. Swint, 50 U.S.L.W. 4425 (April 27, 1982). That case had been tried to the court on the issue of whether the defendant's seniority system violated §703(h) of Title VII, which requires proof of discriminatory intent in adoption of the system, and thus is analogous to this case. The Court of Appeals reversed the trial court's finding that defendant's system was not adopted for a discriminatory purpose,

holding that the trial court had erred in its conclusion on the "ultimate fact" in the case, on which the court of appeals could make an independent determination. This Court's opinion reversing and remanding the case made it quite clear that issues of intent are pure questions of fact to be determined by the trier of fact and not independently reviewed on appeal. 50 U.S.L.W. 4429-30. Thus, the "clearly erroneous" standard of Rule 52(a) applies for appellate review of issues of discriminatory purpose as determined by a trial judge. The instant case points up the need for a similar clarification of the appropriate standard of review under Rule 50 when a trial or appellate court reviews a jury's determination on whether the differential impact of an employment decision reflects purposeful discrimination on the part of the employer. It is even more imperative that factual findings on intent be reviewed with appropriate deference in this situation, when not only the proper functioning of the court

system, but also a litigant's constitutional right to trial by a jury, may be affected. The importance of this issue, and the departure from the accepted course of judicial proceedings which this case exemplifies, justifies the grant of certiorari to review the judgment below.

2. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT THAT DEFENDANT DISCRIMINATED AGAINST PLAINTIFF ON THE BASIS OF RACE.

Plaintiff's evidence at trial established that he and his black fellow-employee, Joe Williamson, were similarly situated in the following respects: both worked as claims adjusters for Allstate, both were aware of Allstate's conflict-of-interest policy, both worked part-time in a body shop for private profit; both worked on Coble's car, and both were discovered by Allstate supervisors to have worked on an automobile involved in an Allstate claim. Despite these similarities, Brady and Williamson were treated differently by the company as follows: Brady was suspended on

February 23, 1977 while Williamson was never suspended. When Allstate's conflict-of-interest policy was reviewed with Brady, the cover memorandum stated that his job was "in jeopardy" and that "his termination will be recommended," while Williamson's form contained no such threats, but suggested only that "Joe should cease from engaging in any aspect of the automobile repair/painting business." Brady was not permitted to amend his form to allow him to continue to do salvage work, but Williamson was. Finally, Brady was discharged by Allstate, while Williamson was not. In fact, Williamson was not even interviewed and asked to sign a cover memorandum until April 17, 1977, three weeks after Brady was fired.

Allstate offered as explanation for the different treatment the fact that Brady owned the body shop and equipment, while Williamson only worked for him. The evidence was undisputed, however, that Williamson had his own key to the shop, worked there at times when

Brady was not there, and that the two men split the profit equally on whatever jobs they did together. Williamson's involvement was clearly enough to violate the conflict-of-interest policy quoted above. Furthermore, Fred Riley, employee relations manager in defendant's Atlanta zone office, testified on cross-examination that Williamson was permitted to continue buying, rebuilding and reselling automobiles for salvage, even though the company policy as quoted and as applied to Brady precluded this type of work. (Tr. 191, 209-210).

As additional evidence on the question of discriminatory intent, plaintiff placed in evidence portions of defendant's affirmative action plan, a key provision of which states: "Allstate can no longer seriously consider for promotion an individual who performs well in such matters as sales and profits, but who is either unable or unwilling to perform equally well in developing promotable minorities and women, or some other aspect of affirmative

action." It was plaintiff's theory of the case that defendant's lower level managers, John Brown and Dan Morley, motivated by a concern for their own futures in the company, misunderstood the affirmative action plan as requiring the retention at all costs of a black employee like Mr. Williamson, even if found to be in violation of a company rule which required the dismissal of a similarly situated white employee like Mr. Brady. Thus, the testimony that Fred Riley of defendant's Atlanta office did not know plaintiff's race, and that James Brett of the Charlotte office did not know Williamson's race is unimpressive considering that it was Brown and Morley of the Charlotte office who met face-to-face with plaintiff, presented the form to him, refused his request to alter it, and told him he was fired when he would not sign it; and it was Mr. Morley who allowed Williamson to alter his form before signing it.

Given the above summary of the evidence

upon which the jury based its decision, the inference that the defendant discriminated against plaintiff on the basis of race is not only rational, but seems to be the only rational explanation for the different treatment of these two employees. The only key point disputed in the testimony was whether or not Brady requested that his cover memorandum be amended to allow him to continue to do salvage work, as Williamson was later allowed to do. Brady testified positively that he did make this request, while Brown and Morley testified that they did not recall his making it. The jury obviously credited Brady's testimony on this point, and chose to disbelieve that of defendant's managers. A conflict of this kind can only be resolved by the jury, and the court may not grant judgment notwithstanding the verdict because it disagrees with the jury's resolution. See 9 Wright & Miller, supra, at 560, and cases cited therein.

The Court of Appeals, bound to view the

evidence in the light most favorable to plaintiff and to give him the benefit of all inferences which the evidence fairly supports, Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690, 696 (1962), should not have disturbed the jury's verdict and the trial court's denial of the motion for j.n.o.v. in this case. Its decision was error which deprived plaintiff of his Seventh Amendment right to a jury trial, and which should be corrected by this Court on certiorari.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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